APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 79-4482
D.C. No. C-75-2062-CBR

LINDA ELDREDGE and CHRISTINE A. MAZUR, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant-Appellee.

OPINION

Appeal from the United States District for the Northern District of California
Charles B. Renfrew, District Judge, Presiding.

Argued and Submitted: March 11, 1981

OPINION

Before FLETCHER and NELSON, Circuit Judges, and KEEP*, District Judge.

FLETCHER, Circuit Judge:

This is an appeal from the district court's order dismissing the action for failure to join indispensable parties. Fed. R. Civ. P. 19.[1/] The opinions are reported at 20 Fair Empl. Prac. Cas. 897 (N.D. Cal. 1979) and 440 F. Supp. 506 (N.D. Cal. 1977). We reverse and remand.

I

FACTS

The facts underlying this suit are recounted in great detail in the district court opinion, 440 F. Supp. at 510-14, and need only be summarized here. Plaintiffs Eldredge and Mazur brought suit

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* The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.

under Title VII, 42 U.S.C. § 2000e-2, against the Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee (JATC), alleging sex discrimination in the operation of JATC's apprenticeship program. Plaintiffs brought the suit as a class action, but the district court has not yet considered the question of class certification.

Defendant JATC is a joint labor-management committee established under an agreement that provides for a trust fund contributed to by the parties to the master collective bargaining agreements in the Northern California construction industry. JATC is composed of equal numbers of labor and management representatives, and acts as a board of trustees for the administration of the Carpenters Apprenticeship and Training Trust Fund for Northern California. It is responsible for establishing, supporting, and

maintaining programs to educate and train journeymen and apprentices in all classifications covered by any collective bargaining agreement that requires employer contributions to the trust fund. 440 F. Supp. at 510-11.

Plaintiffs allege that the process by which JATC selects applicants to its apprenticeship training program discriminates against women. Although JATC has employed other selection procedures in the past, see id. at 511-12, it presently relies on what is known as the "unrestricted hunting license" system. Under this system, an individual must first convince an employer to hire him or her as a beginning apprentice. JATC then places the individual's name on its applicant register. Id. at 512. The applicant enters into an apprenticeship agreement with JATC and is dispatched through the union hiring hall. Id. An

individual needs no prior training to become an apprentice; all that is required is that he or she be 17 years of age and have a high school diploma or its equivalent. Id. at 511.

The master collective bargaining agreements under which JATC operates require employers to hire one apprentice for every five journeymen employed. The apprenticeship is a four-year program. Employers are under no obligation to hire beginning as opposed to experienced apprentices. Id. at 519. In May of 1976, only thirteen of JATC's 3220 registered apprentices were women. Id. at 514.

The essence of plaintiffs' complaint is that, by relying on the unrestricted hunting license system to recruit apprentices, JATC has adopted an entrance requirement for its program which is known to have a discriminatory effect on women. Plaintiffs argue that JATC knows

that individual employers do not hire women under the unrestricted hunting license system, and that JATC's use of this system is therefore illegal under Title VII. The district court assumed for the purposes of its rule 19 analysis that plaintiffs had stated a claim on which relief could be granted. 440 F. Supp. at 518 (citing Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975), aff'd, 534 F.2d 715 (7th Cir. 1976).

The district court held that the 4500 employers and 60 union locals covered by the master labor agreement, or adequate representatives of their interests, were indispensable to the litigation under the standards imposed by rule 19(b).[2/] It ordered them joined within 60 days. 440 F. Supp. at 527. Plaintiffs were granted extensions of time in which to explore the possibilities for joinder, see 20 Fair Empl. Cas.

at 898-99, but joinder of all 4500 employers proved impossible. The plaintiffs then sought to join the Northern California Homebuilders' Conference (NCHBC) to represent the absent employers' interests.[3/] The court held this inadequate and dismissed the case. Id. at 900.[4/] We conclude that the employers are not necessary parties under rule 19(a) and thus cannot be indispensable parties under rule 19(b). We reverse.

II

ANALYSIS

Rule 19 requires two separate inquiries. First, are there persons who should be joined, either because their own interests or the interests of the parties might be harmed by their absence? Such persons, referred to as "necessary parties," must be joined if feasible. Fed. R. Civ. P. 19(a). Second, if parties

determined to be necessary under rule 19 (a) cannot be joined, should the action in "equity and good conscience" be dismissed? Only if the court determines that the action should be dismissed is the absent party labelled "indispensable." Fed. R. Civ. P. 19(b); see English v. Seaboard Coast Line Railroad, 465 F.2d 43, 48 (5th Cir. 1972).

The nature of the rule 19 inquiry is described at some length in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). The inquiry should focus on the practical effects of joinder and nonjoinder. Id. at 116 n.12; Schutten v. Shell Oil Co., 421 F.2d 869, 874 (5th Cir. 1970). Rule 19 was revised in 1966 to emphasize its practical focus and to avoid the inflexible approach taken by many courts under the prior version of the rule. Id. at 871-74; see Provident Tradesmens Bank & Trust Co. v.

Patterson, 390 U.S. at 106-07.

Rule 19(a) describes two categories of persons who should be joined if feasible. If the absent employers fall into either of these two categories, they are "necessary parties."

The first category comprises those persons in whose absence "complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a)(1). This portion of the rule is concerned only with "relief as between the persons already parties, not as between a party and the absent person whose joinder is sought." 3A Moore's Federal Practice ¶ 19.07-1[1], at 19-128(2d ed. 1980); accord, Morgan Guaranty Trust Co. v. Martin, 466 F.2d 593, 598 (7th Cir. 1972). The district court concluded that the absent employers could frustrate any relief granted against JATC, and that complete relief would therefore not be possible unless

the employers were made parties. The court reasoned that the employers could defeat any order against JATC by refusing to hire any apprentices, by hiring only unregistered, nonunion apprentices, or by rejecting all female apprentices dispatched to them. 440 F. Supp. at 519-20. We believe that the district court misapprehended the legal inquiry required by rule 19(a)(1).

If JATC's activities violate Title VII, a question not yet decided, then the court has both the power and the duty to enjoin those activities. The possibility that such an injunction may induce employers to avoid JATC's services, or ultimately to disband the training and referral system altogether, should not defeat the present action against JATC. JATC may not avoid its own liability for practices illegal under Title VII by relying on the employers' possible future conduct that

might frustrate the remedial purposes of any court-ordered changes in the apprenticeship program. See, e.g., United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 132 & n.16 (8th Cir. 1969) (enjoining union from continuing discriminatory referral practices, even though those practices were required by collective bargaining agreement with absent employers).

The district court appears to assume that the employers would discriminate against women because of their sex, and that they would refuse to hire women training in the apprentice program. There is no evidence to this effect in the record. On the contrary, the employers have previously participated, apparently successfully, in a state-mandated affirmative action program designed to increase the number of minority apprentices. See 440 F. Supp. at 511-12.

While it might be desirable to join all 4500 employers in order to eradicate sex discrimination in the industry, we conclude that relief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone. Both sides agree that JATC has the power under the trust fund agreement to structure its apprenticeship program in any way it sees fit. 440 F. Supp. at 510-11. It is quite possible that a court-ordered restructuring of the program could effectively increase the participation of women in the apprenticeship program. See, e.g., EEOC v. Local 638, Sheet Metal Workers' Union, 565 F.2d 31, 34-35 (2d Cir. 1977).

The second inquiry required by rule 19(a) concerns prejudice, either to the absent persons or to those already parties. Rule 19(a)(2)(i) provides that a person should be joined if he claims an interest

relating to the subject of the action, and the disposition of the action may "as a practical matter impair or impede his ability to protect that interest."

The district court held that the employers should be joined since they have a right to select their own employees, a substantial interest that they have a right to protect.[5/] We disagree. The trust fund agreement grants full authority to JATC to structure the apprenticeship program and to select the apprentices. We conclude that the employers have by contract ceded to JATC whatever legally protectible interest they may have had in selecting apprentices to be trained. On the other hand, without the joinder of the employers, any court order that may be entered to enjoin JATC to institute programs cannot go beyond the authority granted JATC under the trust fund agreement. The absent employers are

thus assured that an injunction against JATC will not trench on any rights reserved to the employers under the agreement. We must conclude that the employers' ability to protect whatever interest in employee selection they retain will not be "impaired or impeded" if they are not made parties. They are therefore not necessary parties under rule 19(a)(2)(i).

The district court was understandably concerned that the absent employers might have interests that would be unrepresented in the present suit. Although we have concluded that their interests are not the sort that would make the employers necessary under rule 19, on remand it is possible that some employers, or the NCHBC, may move to intervene. The district court may then consider whether to permit intervention under Fed. R. Civ. P. 24.[6/] See e.g., United States v.

Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 846 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976).

We hold that the trial court erred in dismissing the case for nonjoinder of necessary parties. We REVERSE and REMAND for further proceedings.

FOOTNOTES

1/ Rule 19 provides in pertinent part:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision

(a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

2/ The trial court also decided two issues not raised in this appeal. It held that the plaintiffs had exhausted their administrative remedies, 440 F. Supp. at 515-18, and that the absent parties could be joined even though they were not named in the charge to the EEOC, id. at 524-26.

3/ The NCHBC is a large employers' organization which negotiated the

master labor agreement under which JATC operates. Not all of the employers who subscribe to the master agreement belong to the NCHBC. 20 Fair Empl. Prac. Cas. at 899.

4/ The plaintiffs also sought to join the United Brotherhood of Carpenters and Joiners of America, the international, to represent the union locals. The district court did not decide whether the international could adequately represent the locals because it decided that the action could not proceed in any case. 20 Fair Empl. Prac. Cas. at 899 n. 4.

5/ The district court did not find the employers necessary under rule 19(a)(2)(ii). See 440 F. Supp. at 522-24.

6/ Fed. R. Civ. P. 24 provides:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the

intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 79-4482

LINDA ELDREDGE and CHRISTINE A. MAZUR, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant-Appellees.

ORDER

Filed: February 8, 1982

ORDER

Before FLETCHER and NELSON, Circuit Judges, and KEEP, District Judge.

This opinion filed November 4, 1981 is amended as follows:

On page 5755 of the slip opinion, in the final paragraph, the first sentence should be deleted and the following sentence inserted in its stead:

> The district court appears to assume that the employers would refuse to hire women admitted to the apprentice program pursuant to any judgment that may be entered against JATC in this suit.

The petition for rehearing is denied. The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote

on the suggestion for rehearing en banc. Fed. R. App. 35(b). The suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-75-2062-CBR

LINDA ELDREDGE, et al.,

Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant.

JUDGMENT

Filed: July 9, 1979

This Court having ordered plaintiffs to join as parties defendant certain employers and unions that the Court determined to be indispensable parties under Rule 19, and plaintiffs having failed to satisfactorily comply with the Court's order, and the Court having filed a Memorandum of Opinion on July 9, 1979,

IT IS HEREBY ADJUDGED that the action is dismissed without prejudice pursuant to Rule 41(b).

IT IS HEREBY FURTHER ADJUDGED that the parties shall bear their own costs.

Dated: July 9, 1979.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

ENTERED IN CIVIL DOCKET 7/11, 1979

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-75-2062-CBR

LINDA ELDREDGE, et al.,

Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant.

MEMORANDUM OF OPINION

Filed July 9, 1979

On September 30, 1975, plaintiffs Linda Eldredge and Christine Mazur filed this sex discrimination suit against defendant Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee ("JATC"), alleging that defendant had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d). Defendant JATC is a joint labor-management committee that serves as a board of trustees responsible for the administration of the Carpenters Apprenticeship and Training Trust Fund for Northern California. The trust fund was created by a 1963 agreement among representatives of various local unions of the United Brotherhood of Carpenters and Joiners of America (AFL-CIO and various associations of contractors who employ carpenters in Northern California.

Pursuant to its authority under the trust fund agreement, defendant JATC has established a four-year apprenticeship program leading to journeyman status upon the completion of a specified number of hours of classroom training and on-the-job experience. In order to gain admission into a JATC training program, one must obtain placement on a new applicant referral list maintained by a district office of the JATC and one must be referred to a job as a beginning apprentice.

There are two methods of obtaining such a job referral. One approach is to await referral in numerical order off the new applicant referral lists. If an employer calls a union dispatcher and seeks a beginning apprentice without requesting a particular individual, the next apprentice on the JATC's referral list will be referred. In their

original complaint, plaintiffs alleged that the JATC had violated Title VII through engaging in discriminatory practices in the placement of women on the new applicant referral lists. Plaintiffs claimed that they had been treated less favorably than male applicants when seeking placement on such lists.

Applicants rarely obtain jobs through numerical referral, however, for employers very seldom call in for a beginning apprentice without requesting a particular individual. The vast majority of those admitted to the JATC training program obtain a job referral through the "hunting license" method, which enables an individual to seek employment on his own. After finding a contractor willing to employ him as an apprentice for at least 60 days, an individual may obtain a letter of subscription signed by that employer, place his name on the new

applicant referral list, and then be dispatched to work for that employer.[1]

After discovery in this suit revealed the unlikelihood of receiving a numerical referral off the new applicant referral lists, both plaintiffs unsuccessfully attempted to find employment through the "hunting license" method. They then amended their complaint to allege that defendant's maintenance of this alternative method of securing job referrals violates Title VII. The amended complaint alleges that employers' discrimination against women operates thorugh [sic] the "hunting license" system to exclude women from apprenticeships.

Following plaintiffs' amendment of their complaint, the Court concluded that

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1 A more detailed explanation of the factual background of of [sic] this case is provided in the Court's earlier opinion, Eldredge v. Carpenters 46 Northern California, etc. 440 F.Supp. 506 (N.D. Cal. 1977).

since the numerical referral method plays such a minor role in the job referral system, plaintiffs' efforts to obtain relief that would increase women's chances of gaining admission to defendant's apprenticeship program should be directed at the "hunting license" system rather than the numerical referral method. In fact, the remedy plaintiffs propose did involve elimination of the "hunting license" system:

> "Plaintiffs have not specified the precise system they seek to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of anumber [sic] of non-discriminatory techniques." Eldredge v. Carpenters 46 Northern California, etc. 440 F.Supp. 506, 514 (N.D.Cal. 1977) (footnote omitted).

Thus, the relief contemplated would substantially alter the present system of hiring beginning apprentices.

In order to grant effective relief and to enable the employers to protect their interest in selecting their own employees, this Court ordered that the affected employers be joined as indispensable parties under Rule 19.[2] 440 F.Supp. at 519-527. In so doing, the Court recognized the substantiality of the employers' interest in preserving the present hiring system:

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2 Although the Court was primarily concerned with the need to join the employers, the Court also concluded, for reasons set forth in the earlier opinion, that the local unions that refer applicants registered with JATC to employment should be considered indispensable parties. Eldredge, supra, 440 F.Supp. at 524.

> "Even where there are no objective qualifications for a job, the interest of an employer in selecting those who, for any non-discriminatory reason, he believes to be more highly motivated or more compatible with his existing work force, is not an insubstantial one. * * * It is no doubt true that the '"unstandardized and subjective"' judgments presently being made "'lend themselves to arbitrary and discriminatory hiring'" [citations omitted], and plaintiffs have suggested that such results have occurred in this case. Nevertheless, the employers are entitled to their day in court to contest these allegations before the Court issues an order abolishing the prerogatives they presently enjoy." 440 F.Supp. at 522.

This Court concludes that the employer contributors to the trust fund and the local unions that refer applicants registered with JATC to employment were indispensable parties in whose absence the action could not in equity and good conscience proceed. On November 3, 1977, the Court ordered that if such parties were not joined within sixty days or

within such further time as the Court might, on good cause shown, allow, the action would be dismissed, Eldredge, supra, 440 F.Supp. at 527.

Plaintiffs' Motion to Join Additional Parties Defendant.

Plaintiffs have engaged in extensive discovery in order to determine which employers and unions should be joined and whether certification of defendant classes or joinder of employers' associations and the international union might serve as an alternative means of complying with the Court's order. In order to afford plaintiffs sufficient time to obtain and analyze the voluminous data relating to the affected employers and local unions, the Court granted an extension of the time limit originally set for effecting joinder.[3]

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3 The Court first granted an extension of the time limit to April 2, 1978, and later granted a further (continued)

Plaintiffs have moved to amend their complaint to join the Northern California Homebuilders' Conference ("NCHBC"), an employers' association, and the United Brotherhood of Carpenters and Joiners of America, the international union, as additional parties defendant. Defendant JATC seeks dismissal of the action arguing that joinder of these parties does not comply with the Court's order of November 3, 1977. The most significant objection raised by defendant is that plaintiffs have failed to establish that the NCHBC could adequately protect the interests of all employers involved in the JATC apprenticeship program. Although plaintiffs emphasize that NCHBC negotiates the lead collective bargaining agreement governing carpentry in

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extension allowing plaintiffs through January 1, 1979, to join additional parties defendant.

Northern California, this fact alone does not establish that NCHBC could represent the interests of the numerous employers who would be affected by a court order directing the JATC to institute a new job referral system. Since many of the affected employers are not even members of the NCHBC, but are represented by other contractors' associations or are independent contractors, joinder of NCHBC does not fully satisfy the Court's concerns regarding representation of the employers' interest in preserving the present hiring system. Plaintiffs consider NCHBC "the part most capable of representing employer interests." Yet even assuming that NCHBC is the single party most capable of representing the employer interests at stake here, which plaintiffs have not shown, the Court is not persuaded that joinder of this one contractors' association is a satisfactory

substitute for joinder of the individual employers who would be affected by the proposed decree. Furthermore, the declaration submitted by Mr. Wesley Sizoo, an attorney for NCHBC, in support of JATC's opposition to plaintiffs' motion to amend, states that no employer or member organization of NCHBC has consented to have NCHBC appear on its behalf in this action. Plaintiffs have not contradicted the statement that NCHBC is not authorized to represent the employer interests here, nor have they provided the Court with a basis for concluding that NCHBC could effectively represent those interests.

The Court therefore finds that plaintiffs have not adequately complied with the Court's order of November 3, 1977, insofar as it directed joinder of the employer contributors to the Carpenters Apprenticeship and Training Trust Fund

for Northern California.[4] Accordingly, the action must be dismissed under Rule 41(b) for failure to comply with the Court's order directing joinder of indispensable parties.

Defendant's Motion for Attorneys' Fees and Costs

Defendant JATC seeks an award of costs and an award of attorneys' fees for the period following the Court's November 3, 1977 opinion. In support of the motion for attorneys' fees, defendant relies primarily[5] on

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4 Since the case must be dismissed for failure to join the affected employers, it is unnecessary to consider whether plaintiffs' proposed joinder of the international union would serve as an adequate substitute for joinder of the affected local unions.

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5 In addition, defendant apparently contends that 28 U.S.C. §1927, which permits the Court to require an attorney personally to satisfy excess costs incurred because of the attorney's unreasonable and vexatious (continued)

Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421 (1977), in which the Supreme Court held:

> "[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

Defendant asserts that plaintiffs proceeded in an unreasonable and frivolous

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litigation, could serve in a Title VII suit as a basis for imposing liability on the attorney for attorneys' fees incurred because of such unreasonable conduct. This argument is based on the provision in Title VII permitting the court to award the prevailing party "a reasonable attorney's fee as part of the costs." 42 U.S.C. §2000e-5(k). Since the plaintiffs' attorney in this case did not act so unreasonably that costs could be imposed under 28 U.S.C. §1927, defendant's argument need not be considered, yet the Court notes that it would be very difficult to construe 28 U.S.C. §1927 as authorizing an award of attorney's fees.

manner by engaging in extensive discovery regarding the identity of those employers, employers' associations, and labor organizations that are involved with the JATC apprenticeship program and by then moving to amend the complaint to join NCHBC and the international union, rather than individual employers and the local unions. Defendant views plaintiffs' proposed joinder of these two parties as an unreasonable failure to make use of the information obtained through discovery and states that plaintiffs have acted in total disregard of the reasoning of the Court's November 3, 1977 opinion.

Although plaintiffs' proposed second amended complaint does not adequately comply with the Court's order regarding indispensable parties, plaintiffs have not proceeded in a manner that could be categorized as "frivolous," justifying an award of attorneys' fees. Rather,

they have attempted to comply with the Court's order in the face of great difficulties arising from the fact that the affected employers are so numerous that it is impractical to join them all as individual defendants. Plaintiffs cannot be faulted for considering joining contractors' associations in lieu of employers, as this alternative was referred to in the Court's earlier opinion and not conclusively rejected. Eldredge, supra, 440 F.Supp. at 526-527.

Defendant's memorandum regarding the requested award of costs and attorneys' fees does not specifically address the issue of costs, yet it seems to assume that where a case is dismissed due to plaintiffs' failure to join indispensable parties the defendant should be considered a "prevailing party" within

the meaning of Rule 54(d).[6] Certainly defendant JATC is not a "prevailing party" in the sense of having successfully defended the suit on the merits, nor is this a case where plaintiffs voluntarily dismissed the suit.[7] Even assuming that defendant JATC should be considered a "prevailing party," Rule 54(d) does not

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6 Federal Rule of Civil Procedure 54(d) provides, in relevant part:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs ***."

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7 In Corcoran v. Columbia Broadcasting System, Inc., 121 F.2d 575 (9 Cir. 1941), the Court of Appeals for the Ninth Circuit considered the meaning of the term "prevailing party" as used in a statutory provision governing an award of attorneys' fees. The court concluded that the defendant was a "prevailing party" although the case had not gone to trial on the merits. Since the plaintiff had voluntarily dismissed the suit, the defendant was the prevailing party "within the spirit and intent of the statute." 121 F.2d at 576.

compel an award of costs. The rule provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." In this case the most equitable resolution of this matter is to have each side bear its own costs. Plaintiffs have diligently though unsuccessfully attempted to comply with the Court's order requiring joinder of indispensable parties. The Rule 19 issue that arose in this case presented complex legal questions and particularly difficult practical problems because of the factual setting of this suit. This is not a case where defendant can be said to have "prevailed" in the usual sense. Rather, considerations of equity prevented the suit from continuing without the joinder of parties who as a practical matter could

not be joined.[8] The Court of Appeals for the Ninth Circuit has stated that

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8 While the Court is convinced the result reached here is required for the reasons set forth above, it is nonetheless troubled by the seemingly harsh result. Counsel for plaintiffs have devoted a substantial amount of time and effort in vigorously prosecuting this case. Because the Court is desirous that women be afforded equal opportunities in all areas of employment, including the construction industry, the Court asked counsel for JATC at a status conference in chambers whether JATC would take every step to insure that women would be given every opportunity to be employed as carpenters. In a proposed statement submitted to the Court and counsel for plaintiffs, defendant JATC "reaffirm[ed] [its] desire and intention to exert [its] best efforts to assist women in becoming more active and involved in the carpentry craft through greater participation in the carpenter apprenticeship program. The JATC will communicate with participating carpenter local unions and with individual employers and employer associations to make them aware of the opportunities for employing female apprentices, and will encourage individual employers to hire qualified female apprentices. It is the intention that these efforts will result in an awareness of individual employers (continued)

"the awarding of [costs under Rule 54(d)] is discretionary with the trial judge." K-2 Ski Company v. Head Ski Co., 506 F.2d 471, 476-477 (9 Cir. 1974). The Court concludes that in this case discretion should be exercised to deny the award of costs sought by defendant JATC.

Accordingly, IT IS HEREBY ORDERED that plaintiffs' motion to join additional parties defendant is denied, and the case is dismissed without prejudice pursuant to Rule 41(b) on the ground that plaintiffs have failed to comply with the Court's order to join indispensable

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to the employment of women and a substantial increase in the number of females enrolled in the apprenticeship program." The Court expects that defendant JATC will adopt this statement and exercise its best efforts toward these laudable goals. Hopefully the ultimate relief sought by plaintiffs may be obtained by this informal method.

parties.

IT IS HEREBY FURTHER ORDERED that defendant's motion for an award of attorneys' fees and costs is denied, and the parties shall bear their own costs.

Dated: July 6, 1979.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-75-2062-CBR

LINDA ELDREDGE, et al.,

Plaintiffs,

vs.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE,

Defendant.

AMENDED MEMORANDUM OF OPINION

Filed: November 3, 1977

Plaintiffs Linda Eldredge and Christine A. Mazur filed this sex discrimination action on September 30, 1975. The complaint alleged that the defendant Carpenter 46 Northern California Counties Joint Apprenticeship and Training Committee ("JATC") had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(d), by denying female applicants equal opportunity for placement on the new applicant referral lists used to supply names to union dispatchers for referral of applicants to jobs as beginning apprentices. Plaintiffs sought preliminary relief; certification of a class composed of all women who applied to the JATC for placement on those lists between August 18th and 29th, 1975;[1] orders requiring the JATC to

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1 Plaintiffs have not amended the complaint to allege any larger class. However, they state in (continued)

place and refer applicants in the order in which they apply and to establish an affirmative action program for women; damages including back pay; and costs of suit.

Plaintiffs' motion for a temporary restraining order was denied on October 3, 1975. Although the Court simultaneously ordered the defendant to show cause why a preliminary injunction should not issue, a hearing on that order was withdrawn from the calendar pursuant to a stipulation and order on December 30, 1975. On July 16, 1976, defendant noticed a motion to dismiss the action or for summary judgment; on August 26, 1976, plaintiffs moved to

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their Memorandum in Support of Plaintiffs' Motion to Certify Action as a Class Action, filed August 26, 1976, at 1, that the class is to include all women who were discriminatorily denied admission to defendant's apprenticeship and training program at any time since August of 1973.

amend their complaint, for class certification, and for summary judgment. Each of these motions was extensively briefed by both parties, and oral arguments were heard on September 16, 1976. On September 30th, plaintiffs' motion to amend the complaint was granted, and an amended complaint was filed February 10, 1977. The principal effects of the amendment were to delete the prayer for damages and preliminary relief, and to add new allegations of discrimination. In addition to the alleged discrimination in placement on referral lists, plaintiffs now allege that defendant's system for referring new applicants to the job necessary for admission into apprenticeship, under which the vast majority of new applicants are referred not in numerical order off lists but as they are requested by name by contractor-employers, is itself discriminatory in

effect. Since the amended complaint alleges that illegal effects result from the operation of a system in which parties not before the Court are intimately involved, the Court on February 10, 1977, requested the submission of further factual information and briefing relating to defendant's suggestion that employers and labor unions in the Northern California carpentry trade are indispensable parties to the action. (Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed September 9, 1976, at 6-7.) Defendant filed a memorandum on this point on March 18, 1977, to which plaintiffs responded on May 9th.

The issues presently before the Court are (1) whether the action must be dismissed for failure to exhaust state and administrative remedies; (2) whether all necessary parties as defined by Rule 19, Fed.R.Civ.P., are presently before

the Court; (3) whether class certification is appropriate; and (4) the cross motions for summary judgment. For the reasons set forth below, the Court concludes that plaintiffs have exhausted their remedies within the meaning of Title VII, but that the affected employers and unions must be joined prior to any further disposition of the case.

I. FACTUAL BACKGROUND

Defendant JATC is a joint labor-management committee composed of equal numbers of employer and employee representatives. The committee serves as board of trustees responsible for the administration of the Carpenter Apprenticeship and Training Trust Fund for Northern California ("Fund"), which was created by a 1963 agreement ("trust fund agreement") among representatives of various local unions of the United Brotherhood of Carpenters and Joiners of

America (AFL-CIO) and various associations of contractors who employ carpenters in Northern California. The agreement grants the defendant, as board of trustees, "the power and duty * * * to establish, support or maintain programs * * * for the purpose of educating and training persons as journeymen or apprentices" in all classifications covered by any collective bargaining agreement requiring employer contributions to the Fund.[2] To meet this obligation, defendant has developed a set of

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2 The Northern California carpentry trade is governed by two master agreements which are identical in all respects relevant to this action. Carpenters Master Agreement and Hiring Procedures between the Northern California Home Builders Conference et al. and the Carpenters 46 Northern Counties Conference Board, Exhibit 11 to the deposition of Charles F. Hanna, filed August 26, 1976; Carpenters' Master Agreement (1974-1977) between the Associated General Contractors of California, Inc., et al. and the United (continued)

apprenticeship standards and established a four-year apprenticeship program leading to journeyman status upon the completion of a specified number of hours of classroom training and on-the-job experience. The procedures for selecting among applicants to enter this program are the subject matter of this suit.

No selection procedures are specified in either the trust fund agreement or the relevant collective bargaining agreements. Authority to establish such procedures in each of 43 local regions

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Brotherhood of Carpenters and Joiners of America, Exhibit 12 to the deposition of Charles F. Hanna, supra ("Master Agreements"). Individual employers neither participate in negotiations nor sign these agreements. Instead, they sign brief Memorandum Agreements by which they agree to comply with a master agreement, to contribute to various trust funds, including the apprenticeship and training trust fund, in the amounts specified in the master agreement, and to be bound by all obligations imposed by the corresponding trust fund agreements.

has been delegated to separate local Joint Apprenticeship and Training Committees ("local JATC's"). However, those local bodies are required to operate within the framework of policies adopted by the defendant, and most administrative tasks are performed by defendant's ten District Offices. Until 1974, procedures varied from region to region, but in that year defendant instituted a program imposing uniform selection procedures designed to bring all 46 counties governed by the trust fund agreement into compliance with provisions of state and federal law requiring joint apprenticeship committees to adopt affirmative action plans to increase the number of minorities in the trade.[3] The new procedures were

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3 See Secretary of Labor, Regulations on Equal Employment Opportunity in Apprenticeship Training (continued)

embodied in "Annex C-1," an Equal Opportunity Addendum to the Carpenters 46 Northern California Counties Apprenticeship Standards, and were approved by the California Administrator of Apprenticeship. Local JATC's operated according to Annex C-1 until November 18, 1976, when the Santa Clara County Federation of Joint Apprenticeship and Training Committees obtained state approval of an "amended C-1." The majority of local JATC's have subsequently shifted to the amended C-1 upon findings by the Administrator of Apprenticeship that they have met their quotas for minorities. However,

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29 C.F.R. Part 30 (1976); Cal.Labor Code §§3070 et seq. and 3076 (West Supp. 1977); Cal.Adm.Code T. 8, Part 1, Ch. 2, §§200 et seq. Although California law was recently amended to require joint apprenticeship committees to set goals for women, the precise requirements and enforcement procedures of those new provisions are as yet unclear. Neither party relies on state law in this action.

a few are still operating under the original Annex C-1.

Under both the original and the amended Annex C-1, the qualifications and requirements for admission to apprenticeship are the same: to be qualified, an applicant must be at least 17 years of age and have a high school diploma, G.E.D., or equivalent; to gain admission, he must obtain a position on a new applicant referral list maintained by a local JATC and a referral slip from a local union dispatching him to a job as a beginning apprentice. Once an applicant has satisfied both the listing and the job requirements, he may sign an apprenticeship agreement at one of defendant's district offices, join the union local, and attain the status of "registered" or "indentured" apprentice eligible for classroom training under JATC auspices. All subsequent job

referrals for registered apprentices are handled exclusively by the union locals pursuant to collective bargaining agreements. JATC participation in such procedures is limited to the referral of new applicants to their first jobs.

The original Annex C-1 provides for a "closed list" system of first referrals. Only applicants listed on an existing new applicant referral list are eligible for referral, and placement on that list may only be obtained during limited open periods selected by the local JATC's. Forty-five days prior to a scheduled opening, the local JATC sends announcements to news media, schools, employment services, outreach programs, and others specifying the date and time of the opening, the duration of the open period, and the procedure for applying. At the specified time, applicants line up at the designated District Office and

are given appointments to return and sign, in the order in which they appeared, the "applicant register" for the local JATC from which they desire to be referred. The names of those who are qualified are placed on the new applicant referral list in that order up to a maximum of one and one-half times the estimated number of persons to be referred during the referral period. The list is reviewed by a district coordinator for compliance with affirmative action goals, posted, and distributed to local union dispatchers. Applicants named thereon remain in the pool of those eligible for referral for two years, and may be referred in two ways. First, each applicant is given a letter of subscription or "hunting license," which he may use to seek employment on his own. When he finds a contractor willing to employ him as a registered apprentice for at least

sixty days, that employer's signature on the letter will upon presentation to the union dispatcher entitle the applicant to a referral slip. Second, an applicant may await placement off the new applicant referral list simply by keeping the JATC apprised of a telephone number where he can be reached within 24 hours. When an employer calls the union dispatcher and requests a beginning apprentice without specifying any particular individual, the dispatcher obtains from the JATC District Office the name of the first ranking applicant in numerical order on the list and issues a referral slip for that person. After receiving a referral slip by either method, the applicant is indentured.

Although the original C-1 provided considerable room for employer judgment in the selection of new apprentices, it generated dissatisfaction among employers

because it restricted the use of the hunting license and thus the potential apprentices available for hire to those named on an established list. This objection provided the impetus for adoption of the amended C-1, which establishes an "open list" or "unrestricted hunting license" procedure. An applicant must still obtain a position on the new applicant referral list prior to indenture, but he may do so at any time and regardless of the number of applicants already on the list. Thus, any individual, whether or not listed with the JATC in advance, may obtain a letter of subscription signed by an employer, place his name on the applicant register, enter into an apprenticeship agreement, and be dispatched to work as a registered apprentice forthwith. The only significance of the list under this system is that the rare employer who

calls in for a beginning apprentice without naming an individual will receive the applicant highest in numerical order on that list. It is not disputed that employers are reluctant to hire new apprentices by this method, sight unseen. Of 288 new applicants referred to jobs from the implementation of Annex C-1 until June of 1976, only six, or two per cent [sic], obtained jobs in this way.

Plaintiffs were not aware until mid-1976 of the near futility of awaiting numerical referral off the new applicant referral lists. Believing high placement on the list to be crucial to entry into defendant's program, each plaintiff lined up outside a JATC District Office at midnight on August 17, 1975, nine hours before the scheduled opening for applications. Ms. Eldredge thereby obtained the eighth position in line outside the District 5 (San Francisco)

Office and Ms. Mazur obtained the eighth position outside the District 8 (Martinez) Office. Ms. Eldredge and Ms. Mazur did subsequently receive the corresponding eighth positions on local JATC new applicant referral lists at San Francisco and Martinez, respectively. However, each plaintiff alleges that she encountered an "atmosphere of discrimination that was hostile and discouraging tc women" during the application process.

Specifically, Ms. Eldredge states that the first person in line at San Francisco, a woman, was originall given the number two appointment slip to return and sign the applicant register. The error was corrected at the request of the woman, but when she returned to sign, she did so over a long strip of white tape which had been placed over the number one spot. Ms. Eldredge

further alleges that Percy Long, Apprenticeship Coordinator for District 5, was evasive in answering her questions as to how applicants were placed on new applicant referral lists and how they would be referred to jobs.

Ms. Mazur states that she applied at the Martinez District Office specifically in order to obtain referrals for the Richmond area, where she understood new apprentices were in greater demand, and that she was deprived of the opportunity to sign the Richmond register when District 8 personnel failed to inform her and other women in line that two separate sets of numbered appointment slips were being distributed: one for applicants who wished to sign the Martinez local JATC applicant register, and the other for those who wished to sign the Richmond local register. Arlis Paslay, Supervisor of the District 8

Apprenticeship Program, announced to those in line that anyone from the Richmond, El Sobrante, or San Pablo area should obtain appointment slips from his secretary while those from Eastern Contra Costa County should do so from him. Although Ms. Mazur heard the announcement, she attached no significance to it in light of her Oakland residence, and as a result obtained the number eight appointment slip for Martinez from Mr. Paslay. When she returned to sign the register, she learned for the first time of the Richmond register but was told she could not sign until after all those with Richmond appointment slips had done so. Because two men who were behind Ms. Mazur in line and who similarly were unaware of the existence of two sets of slips were permitted to sign the Richmond register in fourth and fifth positions, plaintiff feels there

has been differential treatment on the basis of sex. However, neither man remembers clearly how he came to sign the Richmond register, and both are residents of San Pablo. Deposition of Joe A. Silveira, filed Feb. 24, 1976, at 6, 14-21; Deposition of Victor Louro, filed Feb. 24, 1976, at 6, 13-17. There is no evidence to suggest that either obtained his position on the Richmond register by anything but routine application of the procedure described by Mr. Paslay.

On or about September 2, 1975, each plaintiff filed formal charges with the Equal Employment Opportunity Commission ("EEOC") alleging that she had suffered discrimination in attempting to obtain a position on defendant's new applicant referral lists. The EEOC on September 8th referred the charges to the California Fair Employment Practices Commission

("FEPC"), as required by 42 U.S.C. §2000e-5(c), with the recommendation that the case was appropriate for immediate preliminary injunction.[4] By notification of September 11, 1975, the FEPC replied that it would not process the charges in light of the EEOC recommendation, and on September 29th the EEOC issued right-to-sue letters to both plaintiffs on the ground that it would not be able to investigate, conciliate or file suit within 180 days. Upon receipt of those letters, plaintiffs filed this action.

Despite the alleged discrimination, both plaintiffs had fulfilled the first

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4 See Notice of Deferral Transmittal, dated 8 Sep. 1975, attached as Exhibit D to defendant's Memorandum in Support of Defendant's Motion to Dismiss, etc., filed July 16, 1976. Although the EEOC request does not itself appear on this form, the FEPC response cites that request as the reason for the state's failure to process the claim.

requirement for admission to apprenticeship when their names were placed on new applicant referral lists. Accordingly, they were eligible for job referrals pursuant to the original Annex C-1 then in effect. Each attended an orientation meeting in late September, 1975, at which she was informed of the two alternative methods of obtaining a referral, but because each believed it was unlikely she could convince a contractor to request a woman by name, neither initially used her "hunting license" to seek employment on her own. Although each plaintiff continuously maintained a current telephone number in the hope of receiving a numerical referral, neither has been dispatched by that method. In August, 1976, after Ms. Mazur had received a letter from the Martinez JATC stating that many applicants were finding jobs on their own, after defendant had moved for summary

judgment in this action, and after discovery had revealed the unlikelihood of numerical referral, both plaintiffs unsuccessfully attempted to find jobs by contacting contractors. At the same time, they sought to amend their complaint to allege that defendant's maintenance of the "hunting license" system as an alternative method of securing job referrals itself violates Title VII.

As of May, 1976, defendant's records show 3,220 registered apprentices, only 13 of whom are women.[5] Of the approximately 1700 persons who obtained positions on new applicant referral lists when applications were opened in August 1975, 92 are women, but as of May, 1976,

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5 In a subsequent affidavit, Charles F. Hanna states that 25 women are currently enrolled as apprentices. Affidavit of Charles F. Hanna, filed March 10, 1977, at 11. However, no complete statistics later than those of May, 1976, are presently before the Court.

only four, or four percent of the women on those lists had been dispatched to jobs while 398, or 25 percent of the men had been dispatched. Plaintiffs now contend that this low representation of women is the result of the establishment and maintenance by defendant of the "hunting license" system, ostensibly as an alternative method of obtaining the first job referral necessary for admission, but in fact knowing that because of employer preference, it is the nearly exclusive method. They have submitted the affidavits of three female apprentices and one female applicant, as well as a letter signed by twelve female apprentices, describing the employer discrimination against women which, they allege, operates through the hunting license system to exclude women from apprenticeship. The act of discrimination complained of on this theory is

thus the defendant's use of a system that passes the decision as to who may enter the program to others who are known to discriminate against women.

Although plaintiffs continue to complain of discriminatory practices in the placement of women on new applicant referral lists, the relative insignificance of placement on those lists as long as the hunting license system remains available suggests that any relief directed to such practices alone would in no way enhance the ability of women to gain admission to defendant's program.[6] Such relief would be appropriate only if the JATC were first ordered to abolish the hunting license

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6 Even Ms. Mazur, who seeks an order granting her and others similarly situated their "rightful places" on the Richmond new applicant referral list, has failed to show that she would have been referred to a job if she had been given a place on that list rather than the Martinez list.

system and to institute a new system for referring applicants to employment, eliminating the present discretion of employers to select new apprentices from those who apply to them. Plaintiffs have not specified the precise system they seek to have instituted, but it is plain that they envision a system requiring an employer who wishes to hire a beginning apprentice to contact the union local and enter a request without naming any individual, whereupon the union would be required to dispatch an applicant selected by the JATC by means of one of a number of non-discriminatory techniques.[7]

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7 Possibilities include the hiring hall system currently used for referral of journeymen to jobs; selection on the basis of the rank order of scores of applicants on one or more qualification standards; random selection from a pool of eligible applicants; selection on an equal basis from separate lists established for minorities, (continued)

II. EXHAUSTION OF REMEDIES

Title VII provides an independent basis for federal jurisdiction over actions pursuant to its terms. 42 U.S.C. §2000e-5(f)(3). Prior to seeking judicial relief, however, plaintiffs must exhaust both state and administrative remedies. Specifically, section 2000e-(5)(c) requires that they first file charges with the state agency, if any, charged with authority to enforce state employment discrimination laws, and await state action for sixty days unless proceedings are earlier terminated; and section 2000e-5(f)(1) requires that they file timely charges with the EEOC, defer

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women, and all others; and random or numerical selection from a pool of eligibles chosen by a system guaranteeing population parity. Affidavit of B. J. Miller in Support of Plaintiffs' Statement of Position, filed May 16, 1977; Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, filed August 26, 1976, at 7-8.

filing suit for 180 days after those charges are filed, and obtain a right-to-sue letter from the EEOC. Defendant argues that plaintiffs have not satisfied the state exhaustion requirement and that the action must accordingly be dismissed. This contention is without merit.

Even where the deferral requirement is not satisfied, dismissal is unnecessary; the proper course is to retain jurisdiction while plaintiffs seek redress from the state agency. Waters v. Heublein, Inc., 547 F.2d 466, 468 (9 Cir. 1976), cert.denied, 45 U.S.L.W. 3840 (1977); Equal Employment Opportunity Commission v. Wah Chang Albany Corp., 499 F.2d 187, 189 n.3 (9 Cir. 1974). That procedure is unnecessary in this case, however, since it is well settled that section 2000e-5(c) is satisfied by the procedure followed here: initial reference of the matter to the state agency

that it will take no action. Love v. Pullman Co., 404 U.S. 522, 525 (1972); Motorola, Inc. v. Equal Employment Opportunity Commission, 460 F.2d 1245, 1246 (9 Cir. 1972). Defendant contends that the FEPC's decision not to pursue the matter was improper under California law in that no reference was made to the Administrator of Apprenticeship and no hearing was provided. Regardless of the merits of this contention, see Cal.Labor Code §3096 (West Supp. 1977), violations of state law in the treatment of a claim do not offend the deferral rule: federal policy requires only that the state be afforded an opportunity to take the case. Pacific Maritime Ass'n v. Quinn, 465 F.2d 108, 110-111 (9 Cir. 1972). Finally, plaintiff's failure to allege deferral in their pleadings is of no significance, since no such allegations are required by Rule 8(a)(1), Fed.R.Civ.P. Equal

Employment Opportunity Commission v. Wah Chang Albany Corp., supra, 499 F.2d at 189.

A more difficult question is posed by plaintiffs' undisputed failure to wait 180 days after the EEOC's assumption of jurisdiction before filing suit, as required by section 2000e-5(f)(1). There is a sharp division in the authorities as to whether this requirement is jurisdictional. Compare Budreck v. Crocker National Bank, 407 F.Supp. 635 (N.D.Cal. 1976), and Jones v. Pacific Intermountain Express, 10 F.E.P. Cases 914 (N.D.Cal. 1976), with Lewis v. FMC Corp., 11 F.E.P. Cases 31 (N.D.Cal. 1975), and Howard v. Mercantile Commerce Trust Co., 10 F.E.P. Cases 158 (E.D.Mo. 1974). For the reasons stated in Budreck, supra, the Court adheres to the view that compliance with the statutory waiting period is ordinarily a prerequisite to the

assumption of jurisdiction. Plaintiffs apparently believe that their prayer for a temporary restraining order and a preliminary injunction made compliance with the statutory period unnecessary for all purposes. Memorandum of Law in Response to Defendant's Motion to Dismiss and for Summary Judgment, filed August 26, 1976, at 23-24. Such a per se rule cannot be supported. However, in the circumstances of this case the Court agrees that jurisdiction was properly assumed to entertain those motions, and that the passage of 180 days prior to hearing on a motion to dismiss cured the jurisdictional defect that would otherwise have required dismissal of the action for permanent relief.

At plaintiffs' request, the EEOC issued right-to-sue letters only 18 days after receipt of the case from the FEPC, and this action was filed the following

day. The result of this procedure was to foreclose any possibility of conciliation -- either formal or informal -- prior to the hardening of positions and narrowing of issues that inevitably follow the assumption of roles as adversary parties in a judicial proceeding, impairing further efforts at voluntary settlement. See Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975); Budreck v. Crocker National Bank, supra, 407 F.Supp. at 643-644. In the ordinary case, such short-circuiting of the time periods contemplated by the statute frustrates the intention of Congress to promote conciliation and voluntary settlement. Yet Congress itself recognized, by enacting a provision authorizing the EEOC to seek preliminary relief, 42 U.S.C. §2000e-5(f)(2), that the interest in enforcement may outweigh the policy favoring non-judicial settlement when an

aggrieved person is threatened with irreparable injury that imperils the adequacy of any final relief. Congress failed to similarly provide for private litigants, however, and their efforts to invoke the jurisdiction of federal courts on motions for preliminary relief pending administrative disposition of the underlying charges have met with mixed success.[8] The conflicting results

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8 For the view that courts have jurisdiction to hear claims for preliminary relief despite the failure to exhaust administrative remedies, see, e.g., Drew v. Liberty Mutual Insurance Company, 480 F.2d 69 (5 Cir. 1973), cert.denied, 417 U.S. 935 (1974); Parks v. Dunlop, 517 F.2d 785 (5 Cir. 1975); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D.Mass.), aff'd, 545 F.2d 222 (1 Cir. 1976). For the opposing view, see, e.g., Nottelson v. A. O. Smith Corp., 397 F.Supp. 928 (E.D.Wis. 1975); Troy v. Shell Oil Co., 378 F.Supp. 1042 (E.D.Mich. 1974), appeal dismissed as moot, 519 F.2d 403 (6 Cir. 1975); Collins v. Southwestern Bell Telephone Co., 376 F.Supp. 979 (E.D.Okla. 1974). Other courts have (Continued)

derive from the courts' efforts to accomodate two competing concerns: first, that it would be unfair and unrealistic to require exhaustion where rights are threatened with irreparable harm, a failure to act may permanently foreclose adequate relief, and the EEOC's caseload precludes it from seeking preliminary relief, see Bowe v. Colgate Palmolive Co., 272 F.Supp. 332, 338 (S.D.Ind.1967),

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blurred the distinction between jurisdiction and the availability of preliminary relief, and appear to hold that jurisdiction may be available only in cases where relief on the merits is appropriate, see Berg v. Richmond Unified School District, 528 F.2d 1208, 1211 (9 Cir. 1975), cert.granted, 45 U.S.L.W. 3508 (1977); Jerome v. Viviano Food Co., Inc., 489 F.2d 965, 966 (6 Cir. 1974) (holding no irreparable harm and thus no jurisdiction where no existing employee-employer relationship); Donald v. Ray, 377 F.Supp. 986, 987 (E.D.Tenn. 1974); or only where the circumstances particularly demand such relief, Townsend v. Exxon Co., 420 F.Supp. 189, 193 (D.Mass. 1976) (retaliatory discharge).

aff'd in part and rev'd in part, 426 F.2d 711 (7 Cir. 1969); Drew v. Liberty Mutual Insurance Company, 480 F.2d 69, 73-74 (5 Cir. 1973), cert.denied, 417 U.S. 935 (1974); and second, that to permit individuals to bypass the statutory mechanism in cases where the EEOC does not seek prompt judicial relief would flood the courts with such requests, see Collins v. Southwestern Bell Telephone Co., 376 F.Supp. 979 (E.D.Okla. 1974).[9]

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9 A third concern occasionally mentioned is that without jurisdiction over the underlying cause of action, a court is precluded from providing relief of any sort. Troy v. Shell Oil Co., supra, 378 F.Supp. at 1048; Nottelson v. A. O. Smith Corp., supra, 397 F.Supp. at 933. This concern seems unfounded, however, in view of the principle established in other areas of administrative law that a court has power to preserve the status quo by staying private action pending an administrative decision. See Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1257 (1971).

Although the issue is currently before the United States Supreme Court, the law of this Circuit at the present time is that in a "limited class of cases" where there exists a high probability of success on the merits and the threat of irreparable harm, a court may entertain a suit to maintain the status quo pending administrative disposition. Berg v. Richmond Unified School District, 528 F.2d 1208, 1211 (9 Cir. 1975), cert. granted, 45 U.S.L.W. 3508 (1977). Although the facts of this case depart from the Berg rule in at least three respects, none of those differences calls for a change in the result. First, since the motion for a preliminary injunction was withdrawn from the calendar, the Court has made no findings on the merits. Nevertheless, the EEOC's evaluation of the case as one appropriate for immediate preliminary injunction would

appear to satisfy the threshold test that there be some substance to the claim. To permit suits only where such a determination is made need not lead to any flood of litigation. Second, plaintiffs' motions went beyond merely "maintaining the status quo," since plaintiffs were not employees seeking relief from threatened changes in the employment relationship, but applicants for admission to defendant's program. A few courts have drawn a distinction on this basis, see footnote 7, supra, but differential treatment is not justified by the policies involved: if a preliminary injunction is otherwise appropriate, it makes no difference to the injured plaintiff or to the enforcement of Title VII that the injury is to be imposed by inaction rather than by action. Finally, plaintiffs arguably sought more than interim relief pending

administrative disposition, since the EEOC had prematurely issued its final right-to-sue letter, thus terminating the administrative phase. See EEOC v. Pacific Press Publiching Association, 535 F.2d 1182, 1186 (9 Cir. 1976). However, the EEOC had certified that it would be unable to reach the case within the 180-day period. Thus, no administrative disposition was to be anticipated. Moreover, the prospects of informal settlement are unlikely to have been impaired by the initiation of the suit for permanent relief to any greater extent than they would already have been impaired by the filing of the motion for a preliminary injunction. To hold that the action was barred by an EEOC error having no effect on statutory policy would indeed be pointless. Had the parties known that the 180-day period would be interpreted as jurisdictional,

they could have limited their initial prayer to preliminary relief, waited 180 days, obtained a right-to-sue letter, and sought permanent relief, all without any significant substantive effect.

Although the Court thus concludes that jurisdiction was properly taken over the claims for preliminary relief, this conclusion does not in itself justify the assumption of jurisdiction over the underlying claim. That jurisdiction can only be justified if the lapse of 180 days between the EEOC's assumption of jurisdiction and the hearing on a motion to dismiss can cure the initial failure to meet that jurisdictional requirement. It is settled that subsequent receipt of a right-to-sue letter can cure the jurisdiction in a suit initially filed without one, Berg v. Richmond Unified School District, supra, 528 F.2d at 1212, but the differing policies involved make it

less clear that the mere passage of time, absent a dismissal and a refiling with the EEOC, should ordinarily be permitted to cure the jurisdictional defect of premature filing. Compare Budreck v. Crocker National Bank, supra, 407 F.Supp. at 647 n. 19, with Berg v. LaCrosse Cooler Co., 548 F.2d 211, 213 (7 Cir. 1977), and Troy v. Shell Oil Co., 519 F.2d 403 (6 Cir. 1975). Where the parties were properly before the Court in the first instance on motions for preliminary relief, however, the Court concludes that no policy would be served by a dismissal. The only departure from proper procedures was the premature issuance of the right-to-sue letter and the resulting premature filing of a complaint for permanent relief. To dismiss now would not deter other litigants from seeking judicial action in circumstances where preliminary relief may be appropriate, and thus would not

serve the policy of promoting informal settlement prior to the onset of litigation. It would no doubt discourage the EEOC from divesting itself of claims prematurely, and thus would serve the congressional purpose of providing ample opportunity for administrative action. Where the backlog of cases prevents an administrative disposition in any case, however, this result has insufficient practical impact to justify the imposition of hardship in a particular case.

III. RULE 19

It is no doubt true, as plaintiffs argue, that a joint apprenticeship committee cannot avoid liability under Title VII by delegating the responsibility for screening applicants to a third party. See Crockett v. Green, 388 F.Supp. 912 (E.D.Wis. 1975), aff'd 535 F.2d 715 (7 Cir. 1976). The relief contemplated in this case, however, will have

substantial impact on both the employers who must hire apprentices if they are to receive on-the-job experience and the unions which pursuant to collective bargaining agreement are responsible for the dispatch of all employees to jobs with signatory employers. Rule 19[10] does not, of course, require joinder of all parties who may be affected by an order.

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10 Rule 19 provides in part:

"(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject to the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses (continued)

The issues are, first, whether employer or union involvement is of such a nature that without them complete relief cannot be accorded those already parties, Rule 19(a)(1), and second, whether their interests are such that to proceed in

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to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of this action improper, he shall be dismissed from the action.

"(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

their absence may as a practical matter prejudice them or subject the parties already before the Court to a substantial risk of incurring inconsistent obligations, Rule 19(a)(2). If either of these conditions is shown, Rule 19(a) requires that the absent parties be joined if to do so will not deprive the Court of jurisdiction over the subject matter. If a party cannot be joined as required, Rule 19(b) calls for a second inquiry to determine whether in equity and good conscience the action should be dismissed.

Plaintiff's initial contention is that when no relief is sought against absent parties, those parties cannot be regarded as "indispensable." This argument is wholly without merit. By definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so

situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests. The cases cited by plaintiffs are not to the contrary. Each merely lists the failure to seek relief against the absent parties as one factor in a decision that joinder was not required, in cases where no involvement or participation by those parties in the challenged discriminatory practices had been alleged. Hibbler v. Miller's of Birmingham Bankhead Highway, Inc., 496 F.2d 1171, 1172 (5 Cir. 1974); Waters v. Heublein, Inc., 11 E.P.D. ¶10,620 at 6587 (N.D.Cal. 1975), rev'd on other grounds, 547 F.2d 466 (9 Cir. 1976), cert.denied, 45 U.S.L.W. 3840 (1977). In contrast, the involvement of both employers and unions in the subject matter of this action is evident on the face of the amended complaint.

In a similar vein, plaintiffs contend that complete relief can be accorded by an order against the JATC alone, since pursuant to the trust fund agreement it is solely responsible for establishing and maintaining apprenticeship programs, since no particular procedure for selecting apprentices is enshrined in any agreement to which absent parties are signatories, and since it alone selected and can abolish the "hunting license" system, subject to state approval. This argument misconceives the nature of the issues under Rule 19(a)(1). Although the legal position of the present defendant and its theoretical ability to comply with an order are relevant, they may be outweighed by a finding that absent parties may as a practical matter prevent the full realization of the intended relief. The Court must guard against the formulation of "'paper'

decrees which neither adjudicate nor, in the end, protect rights." Schutten v. Shell Oil Co., 421 F.2d 869, 874 (5 Cir. 1970). Thus the contractual rights and duties relied on by plaintiffs are only a starting point for a full consideration of the actual role of each party in the formulation of the practices complained of and the stake each has in maintaining them. See LeBeau v. Libby-Owens-Ford Co., 484 F.2d 798, 800 (7 Cir. 1973).

A. The Employers

Employers are not obligated to hire beginning apprentices by either the master collective bargaining agreements governing the trade[11] or the trust fund agreement itself. They need only employ one apprentice (at any experience level) if five journeymen are employed, and one

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1 [sic] See note 2, supra.

additional apprentice for each five journeymen thereafter. Master Agreement §40. When an employer does request a beginning apprentice, he retains the right to reject the individual dispatched "for any reason," Master Agreements §49(9), subject only to liability for two hours "show-up time" to be paid to the applicant, Master Agreements §30. No new system of referral adopted by the JATC could either require contractors to employ beginning apprentices, other than those necessary to meet the contractual minimum, or compel those who do so to accept any particular individual. Nor could such an obligation be created by any decree fashioned by this Court in their absence. Employers could refuse to hire beginning apprentices or refuse to hire women when referred without violating the terms of a decree ordering the JATC to adopt a revised referral

system. Although such actions could violate an order requiring the implementation of an affirmative action plan to promote the indenturing of women, the employers are not sufficiently "identified * * * in interest" with the JATC to be bound by such a decree as non-party participants under Rule 65(d), Fed.R.Civ. P. Regal Knitwear Co. v. Board, 324 U.S. 9, 13-14 (1945); see Equal Employment Opportunity Commission v. Local Union No. 3, International Union of Operating Engineers, No. C-71-1277-RFP (N.D.Cal. March 16, 1977).

Employers thus have the ability to defeat any relief ordered in this action in three ways. First they may refuse to hire new apprentices at all, if they do not wish to accept individuals without first interviewing them. Under a revised referral system, the absence of applicants actively seeking to convince

employers to hire beginning apprentices may tend to encourage this result. Of course, such action would eventually result in a reduction of the total number of apprentices, and some employers would ultimately be forced to hire new apprentices in order to maintain the apprentice-journeyman ratios specified in the collective bargaining agreements and in the California statute governing projects undertaken pursuant to contracts with state and local government entities. Cal. Labor Code §1777.5 (West Supp. 1977). However, no evidence has been submitted to demonstrate the impact of these limitations on the hiring of new apprentices, in light of the large number of experienced apprentices presently unemployed, the inapplicability of the contractual provision to employers using less than five journeymen, and the numerous exemptions created by the statute.

Second, employers may, with the cooperation of union locals, hire unregistered, non-union apprentices, who may obtain sufficient experience and skill to be classified as journeymen and thus be accorded equal treatment at the hiring hall without regard to participation in defendant's program. Such apprentices would not, however, satisfy either the contractual or the statutory obligation to hire apprentices in specified ratios. See Master Agreements §40. Cal.Labor Code §1777.5, supra. Moreover, under United States Department of Labor regulations all contracts covering federally financed and assisted construction must include a clause requiring non-registered apprentices to be paid at a rate determined by the Secretary of Labor for the class of work actually performed, rather than the lower rate permitted for registered apprentices. 29 C.F.R. §5.5(a)(4)

(1976). Again, no evidence as to the overall impact of these provisions on the trade is before the Court.

Finally, assuming that these provisions will motivate employers to hire significant numbers of beginning registered apprentices, female applicants may still be rejected at a cost of two hours' pay, which may be estimated from the wage scale effective June 16, 1976, at approximately $21 each.[12] Plaintiffs have submitted substantial evidence which appears to show that it is the employers, not the JATC, who are responsible for the dearth of women in the carpentry trade. There

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12 The schedule of wages attached to the Northern California Home Builders Conference Master Agreement, Appendix 7 to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed September 9, 1976, shows a wage rate for beginning apprentices of $6.75 per hour and a schedule of contributions for fringe benefits totalling $3.80 per hour, for a total of $21.10 for the two hours of show-up time.

is nothing in the record to indicate that the reasons presently given by employers for rejecting women would not persuade them to continue rejecting them at this slight additional cost.[13] It is not clear whether this tactic would violate any contractual obligation owed to the JATC, but even if it would, there is no suggestion in the record that the JATC has enforcement authority adequate to force recalcitrant employers to accept female applicants.[14]

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13 Defendant has suggested that the use of a closed list may have motivated local JATC employees to accelerate efforts to indenture minority apprentices in order to return to the free selection system once quotas were attained. This factor would almost certainly be outweighed in this case, however, by the documented reluctance of employers to hire women.

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14 Defendant has stated that the JATC has some police authority and can withdraw the use of apprenticeship (continued)

The record does not reveal whether an applicant who is dispatched and rejected by the employer would become a registered apprentice. Assuming that he would, the ability of employers to reject those dispatched would not impede attainment of plaintiffs' announced goal of entry into defendant's program. It would, however, prevent any meaningful participation in that program, since only

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facilities from employers who hire unindentured apprentices. Memorandum of Points and Authorities RE: Indispensable Parties and the Jurisdiction of the Court, filed March 18, 1977, at 5. No document evidencing this authority is before the Court, and it is unclear whether the JATC could withdraw facilities from employers who do not bypass the referral system entirely but simply refuse to accept certain individuals. Even if this sanction is available, any attempt to impose it would place the JATC in the difficult position of having to prove the illegal motive of discrimination or face liability for refusing to provide services merely because the employer had exercised his contractual right to reject applicants "for any reason." Master Agreements §49(9).

schooling, not on-the-job training, would be available to women. Thus, the relief obtained in this lawsuit would serve only to swell the ranks of unemployed apprentices. This surely cannot be the "complete relief" contemplated by Rule 19(a).

It is no answer to these problems to say that plaintiffs seek limited relief in order that women may gradually integrate the trade, and that if future employer discrimination excludes women from the full benefits of apprenticeship, such women may seek legal redress against the responsible parties. The plain fact is that the opportunity to gradually integrate the trade exists now to the same extent and subject to the same obstacles as it would under any decree that could be fashioned against the JATC alone. There is no evidence that the change in referral system sought here will have any effect on the apparent source of the

discrimination alleged -- the absent employers. More women might indeed attain the status "registered apprentice," but to obtain jobs they would have to bring to court precisely the same parties who would be sued in the absence of any decree against the JATC.[15] Although the plaintiffs' motive -- to avoid unnecessarily taxing judicial resources -- is a laudable one, the Court must conclude that it would be a misuse of those resources to pursue this action to a conclusion in the absence of parties without whom any relief would quite probably be a futile gesture.

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15 In fact, a decree establishing a closed list referral system could hamper the process of obtaining relief against discriminating employers. Under the amended Annex C-1, any woman may seek work as a carpenter and file suit against each employer who rejects her because of her sex. Under the type of system sought by plaintiffs, the class of potential plaintiffs who may sue a given discriminating employer will be far more limited.

None of the authorities cited by aplaintiffs [sic] supports a contrary result. The Court has been directed to only one case in which relief was afforded against a party which had used a non-party's discriminatory action as the vehicle for its own discrimination. Crockett v. Green, supra, 388 F.Supp. 912. There, the City of Milwaukee was ordered to suspend a requirement that skilled tradesmen have completed a formal apprenticeship and a designated amount of journeyman experience prior to hiring, because past discrimination had prevented blacks from obtaining those qualifications. Since the effectiveness of that relief did not depend in any way on union participation, Crockett provides no precedent for the relief sought here. The analogy would be more apt if the City had there been ordered to require the union to accept more blacks into apprenticeship.

Plaintiff relies on decisions holding that relief may be granted against unions to modify discriminatory job referral systems in the absence of the affected employers. Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators, 525 F.2d 1354 (9 Cir. 1975); United States v. Sheet Metal Workers Intern. Ass'n, Local Union No. 36, 416 F.2d 123, 132 n.16 (8 Cir. 1969); United Minority Workers v. Intern. Union of Operating Engineers, 10 E.P.D. ¶10,581 (D.Ore. 1975); Butler v. Local No. 4 and Local No. 269, Laborers' Intern. Union, 308 F.Supp. 528 (N.D.Ill. 1969). None of these decisions, however, involved allegations of discriminatory conduct by the employers, a fact on which the courts expressly relied in both Kaplan, supra, 525 F.2d at 1361, and United Minority Workers, supra, 10 E.P.D. at 6402. Where, as in those two cases

and in Butler, supra, only internal union policies were challenged,[16] there was no reason to fear that the relief would not be complete. A more substantial question was presented in Sheet Metal Workers, supra, in that the changes in referral practices ordered by the court required modifications in the collective bargaining agreement and thus were not possible without the cooperation of the employers. In apparent recognition that such relief could not be ordered against the unions alone, the Court of Appeals stated that compliance could be achieved by discontinuing those practices which were found

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16 In Butler v. Local No. 4 and Local No. 269, Laborers' Intern. Union, supra, the court expressly rejected the union defendants' assertion that plaintiffs sought the creation of a hiring hall, a remedy which would have required the cooperation of non-party employers. Instead, the court found that plaintiffs had alleged the existence of a de facto hiring hall and sought only to end the unions' discriminatory practices within that framework. 308 F.Supp. at 532.

to violate Title VII, presumably by abandoning the referral system altogether. In this case, no such resolution is possible, because the defendant's effective abandonment of its responsibility for referral is precisely the act complained of, and the underlying job requirement cannot be eliminated without altering the nature of the apprenticeship program itself.

Of more relevance to the instant case are decisions in which courts have found evidence suggesting that the absent party may have been responsible for the alleged discrimination, and have therefore ordered joinder. Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 52-53 (8 Cir. 1975); Evans v. Sheraton Park Hotel, 503 F.2d 177, 181 (D.C.Cir. 1974). Cf. Wright v. Stone Container Corp., 524 F.2d 1058, 1062 (8 Cir. 1975) (doubting adequacy of

class representative who failed to join union whose policies contributed to creation of suspect practices); Equal Employment Opportunity Commission v. Eagle Iron Works, 8 E.P.D. ¶9541, at 5356 (S.D.Iowa 1974) (mere signatory of collective bargaining agreement not indispensable party where no suggestion it has engaged in unlawful practices); Ostapowicz v. Johnson Bronze Co., 369 F.Supp. 522, 531-532 (W.D.Pa. 1973), modified on other grounds, 541 F.2d 394 (3 Cir. 1976) (union need not be joined where discriminatory effect of collective bargaining agreement is caused solely by employer actions). See also Haas v. Jefferson National Bank, 442 F.2d 394, 397-398 (5 Cir. 1971) (absent party who participated in alleged unlawful conversion should be joined). Even where no responsibility for unlawful conduct is alleged, courts have recognized

that relief may be ineffective where absent parties are "active participants" without whom a program challenged as discriminatory could not operate. Spirt v. Teachers Ins. and Annuity Ass'n of America, 416 F.Supp. 1019, 1022 (S.D.N.Y. 1976); McDonald v. General Mills, Inc., 387 F.Supp. 24, 38 (E.D.Cal. 1974). In this case, the employers are not only participants in the apprenticeship program but indeed the allegedly principal cause of the discrimination complained of. Plainly here, as in Evans v. Sheraton Park Hotel, supra, the Court should decline the invitation to grant "rather ineffective symptomatic relief, leaving the root * * * to continue." 503 F.2d at 181.

This determination alone is sufficient to require joinder. However, it should be noted that the second factor to be considered under Rule 19(a), the

interest of the employers in the subject matter of the action, supports joinder as well. Under the present system employers enjoy the right to select their own beginning apprentices subject only to the requirement that the applicant be listed with the JATC in localities where the original Annex C-1 is in effect. Even where there are no objective qualifications for a job, the interest of an employer in selecting those who, for any non-discriminatory reason, he believes to be more highly motivated or more compatible with his existing work force, is not an insubstantial one. Nor does recognition of that interest require any assumption that women dispatched under a revised system would be less motivated or qualified in any way than men: the employer's interest in selecting an employee of his own choosing would be violated by the dispatch

of an undesirable man as much as by that of a similar woman. It is no doubt true that the "'unstandardized and subjective'" judgments presently being made "'lend themselves to arbitrary and discriminatory hiring'", Waters v. Furnco Construction Corp., 551 F.2d 1085, 1089 (7 Cir. 1977), quoting Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 724 (8 Cir.), cert.denied, 414 U.S. 854 (1973), and plaintiffs have suggested that such results have occurred in this case. Nevertheless, the employers are entitled to their day in court to contest these allegations before the Court issues an order abolishing the prerogatives they presently enjoy.

Plaintiffs maintain that the employers here gave up their ability to protect this interest when they agreed to be bound by the trust agreement and thus delegated to the JATC the authority

to establish apprenticeship programs. Although the terms of the instrument are unclear on this point, we may assume that the employers did thereby agree to submit to any referral system adopted by the JATC. Even so, they retained a significant measure of control over the system selected, since they appoint half the members of the JATC and may bargain with the remaining union members. A court order instituting a new referral system will deprive them of this control. Of course, such an order would not wholly eliminate employer freedom to select apprentices, since they are always entitled to reject applicants referred. That freedom would, however, be constrained in two ways: it could be exercised only at the price of show-up time; and the pool of applicants would be limited to those referred, one at a time, by the union. Any conceivable decree would thus

practically impair the employer's ability to protect a significant interest in selectivity in hiring.

The fact that this interest stems from a collective bargaining agreement does not, as plaintiffs suggest, render it irrelevant for purposes of Rule 19. None of the decisions cited for that proposition establishes any such per se rule: each court has examined the circumstances of the case to determine the actual effect of the action on the absent party, and a key consideration has been that the discriminatory conduct alleged is limited to the named defendant. Waters v. Heublein, Inc., supra, 11 E.P.D. at 6587; Rosario v. New York Times Co., 10 E.P.D. ¶10,155, at 7704 (N.D.Ga. 1975); Equal Employment Opportunity Commission v. Eagle Iron Works, supra, 8 E.P.D. at 5356; Ostapowicz v. Johnson Bronze Co., supra, 369 F.Supp.

at 522, 531-532.

Nor does the presence of a party who is already defending employer interests to some extent obviate the need for joinder. Though frequently mentioned, this factor has merely been one among many considered in determinations pursuant to Rule 19. See United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1322 (9 Cir. 1975) (international and local unions); United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 310 (5 Cir. 1975), vacated on other grounds, 45 U.S.L.W. 4505 (1977) (international and local unions); United States v. St. Louis - San Francisco Railway Co., 52 F.R.D. 276, 280 (E.D.Mo.), rev'd on other grounds, 464 F.2d 301 (8 Cir. 1971), cert.denied, 409 U.S. 1107, 1116 (1973) (union and its members); United States v. Enterprise Ass'n of Steamfitters, 360 F.Supp. 979, 995 (S.D.N.Y. 1973) (trade

association and its members). Here the JATC is a legal entity separate and distinct from the employers and unions which created it. No agency relationship has been alleged, and the JATC's interests are not identified with those of the employers as are those of the entities dealt with in the cases cited above. In fact, the JATC has no independent interest in defending employer selectivity. Here, as in Grogg v. General Motors Corp., 12 E.P.D. ¶11,204 (S.D.N.Y. 1976), there simply are not adequate assurances of the unity of the various parties to hold joinder unnecessary on that ground. 12 E.P.D. at 5542.

Finally, decisions rejecting the claim that employers must be joined in suits seeking the elimination of discriminatory union referral practices are inapposite. In each such case the employers had already completely given up

their right to selectivity when they agreed to accept those persons dispatched by the union and retained no control over union methods of referral.[17] No case has been found which orders a union or apprenticeship committee to establish a hiring hall or adopt other measures limiting employer selectivity in hiring in the absence of the affected employers.

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17 In Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Operators, supra, 525 F.2d 1354, the Court did to some extent modify procedures for operation of a referral system which were set forth in a collective bargaining agreement, and thus not beyond employer control. However, the order affirmed in Kaplan merely required that the female plaintiff be placed on an existing roster which entitled photographers to preference in hiring, without altering the system of hiring or the degree to which employers were free to select their own employees. The only possible prejudice from the addition of one individual to a pool to which employers had already agreed to give preference was potential lack of qualification, and the evidence indicated that employers considered the plaintiff qualified. 525 F.2d at 1361.

B. The Union Locals

The role of the union locals in the subject matter of this action is limited to the dispatch of beginning apprentices at the request of employers. Defendant argues that their presence is required by Rule 19(a)(1), because they are in a position to frustrate the effectuation of any relief by simply ignoring new JATC procedures and continuing to dispatch those individuals requested by employers. Although the extent of the unions' contractual obligation to abide by procedures adopted by the JATC is unclear, in practice it appears that the JATC can enforce its selection of new apprentices by refusing to indenture any wrongly dispatched individual. Thus, to the extent that employers desire registered apprentices, the unions would be unable to satisfy that demand without complying with the JATC procedures. The relief

ordered in this action could be frustrated only to the extent that unregistered apprentices satisfy employer needs.

With respect to Rule 19(a)(2), the unions have an interest in the maintenance of an effective apprenticeship and training program which produces adequate numbers of competent apprentice and journeyman members. If, for the reasons discussed in Part II, A, supra, the decree of the Court were to result in either a significant decline in the number of apprentices employed or an increase in unemployment among apprentices, that interest would be significantly impaired.[18] Moreover, on these assumptions

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18 Contrary to plaintiffs' assertion, the impairment of union interests goes beyond the mere dissatisfaction of "majority" employees that may be anticipated in any Title VII case. See Phillips v. Carborundum Co., 361 F.Supp. 1016, 1020 (W.D.N.Y. 1973). Here, the order may prevent the satisfaction of obligations to all the unions' apprentice members and to the union itself.

the unions would be entitled to demand that the JATC fulfill its obligation under the trust fund agreement to maintain an adequate apprenticeship program. The JATC would then be placed in the untenable position of choosing between two mutually exclusive obligations: to assure the indenturing of women pursuant to court order, and to maintain the program as required by contract.

On the present state of the record it is impossible to say with certainty that the relief sought here will reduce the total number of apprentices employed or increase unemployment among apprentices, thus requiring joinder under Rule 19(a)(2), or increase the demand for unregistered apprentices, thus requiring joinder under Rule 19(a)(1). However, in light of plaintiffs' allegations and supporting affidavits to the effect that employer reluctance to hire

women is the real source of the discrimination alleged, the Court concludes that employer action leading to one or more of these results is sufficiently likely as to require joinder of the affected union locals.

IV. JOINDER

Defendant argues that joinder is barred by failure to name the absent parties in charges filed with the EEOC and failure to file suit against those parties within 90 days of receiving notice of right to sue, as required by 42 U.S.C. §2000e-5(f)(1). Neither of these omissions can prevent joinder in this case.

Title VII's policy of encouraging conciliation and voluntary settlement in the first instance has led courts to formulate a rule that parties not named in an EEOC charge are not subject to suit. Thornton v. East Texas Motor Freight, 497 F.2d 416, 423 (6 Cir. 1974); LeBeau v.

Libby-Owens-Ford Co., supra, 484 F.2d at 799; Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7 Cir. 1969). This policy-based rule is, however, subject to numerous exceptions in favor of conflicting policies, two of which are relevant here.

First, since EEOC charges are frequently filed without legal assistance at an early stage of the proceedings, it would frustrate the goals of Title VII to require procedural exactness in stating the charges. Kaplan v. Intern. Alliance of Theatrical and Stage Employees and Motion Picture Machine Operators, supra, 525 F.2d at 1359. Thus, charges are to be construed with the utmost liberality, and parties named in the factual statement in sufficiently specific terms to apprise the EEOC of the source of the alleged discrimination may subsequently be joined in judicial proceedings. Id.; Sanchez v. Standard

Brands, Inc., 432 F.2d 455, 562-463 (5 Cir. 1970). Here, both plaintiffs alleged that they were being denied membership in the "carpenters' union." As respondent, Ms. Eldredge named "carpenters Local 46, J.A.T.C.," and Ms. Mazur named "Union 46, Carpenters Joint Apprenticeship Training Committee." These statements were plainly sufficient to apprise the EEOC of the union's involvement in the alleged discrimination and thus to support joinder in this action.

Second, when application of the procedural bar would prevent joinder pursuant to Rule 19(a), important policies favoring enforcement of Title VII, judicial economy, and the rights of litigants would be frustrated by an inflexible rule. In such cases, considerations of "uniformity * * * [and] of the time, effort and expense involved in duplication,

with the possibility of inconsistent results" demand that the entire matter be disposed of in one proceeding. Bremer v. Saint Louis Southwestern Railroad Co., 310 F.Supp. 1333, 1340 (E.D.Mo. 1969). Joinder is thus plainly appropriate where no purpose of conciliation could have been served if the parties had been named. See Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1095 (6 Cir. 1974). Several courts have so held in situations where the absent party was not alleged to have been responsible for any discrimination, or would natu- ally have become involved in any efforts to conciliate. Grogg v. General Motors Corp., supra, 12 E.P.D. at 5542; Equal Employment Opportunity Commission v. Braswell Motor Freight Lines, Inc., 8 E.P.D. ¶9714 (N.D.Tex. 1974); Equal Employment Opportunity Commission v.

Brotherhood of Painters, Decorators and Paperhangers, 384 F.Supp. 1264, 1268 (D.S.D. 1974); Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp. 313, 323 (D.Mass.), aff'd, 545 F.2d 222 (1 Cir. 1976). Here, it may be noted that no conciliation was attempted; consequently the failure to name the employers had no practical effect on this policy. Such a finding is not necessary to joinder, however, for numerous courts have found that the interests represented by Rule 19 and by enforcement of Title VII simply outweigh the interest in conciliation:

> "However, we are not convinced that the value of conciliation supersedes the value of enforcement, to the end that after a charge has been processed before the EEOC and court action commenced, the district court is powerless to order joinder under Rule 19(a) and is further required to dismiss the action under the indispensable party provisions of Rule 19(b). Where, as here, the

> chartering International was an obscure party, requiring court action to determine whether or not its presence in the action was necessary for complete relief among those already parties, to deny joinder under 19(a) would cripple the rights of the charging party as well as those of the party charged." Evans v. Sheraton Park Hotel, supra, 503 F.2d at 183.

The absent employers here were "obscure" parties in the sense that plaintiffs apparently did not know them to be a source of discrimination until long after the EEOC charges were filed. Even after the employers' role was identified, it was not unreasonable, in the absence of knowledge of the relationships among the parties, to assume that complete relief could be obtained from the JATC alone. That the absent parties were "obscure" in this sense has not, however, generally been found to be a prerequisite to joinder pursuant to Rule 19(a) despite the failure to name parties before the

EEOC. Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 993 n.25 (D.C.Cir. 1973) (dictum); Equal Employment Opportunity Commission v. McLean Trucking Co., 525 F.2d 1007, 1012 (6 Cir. 1975) ("indispensable parties joined for purpose of interpreting collective bargaining agreement); Held v. Missouri Pacific Railroad Co., 373 F.Supp. 996, 999 (S.D. Tex. 1974) (dictum that "indispensable" parties may be joined); Equal Employment Opportunity Commission v. Rexall Drug Co., 9 E.P.D. ¶9936, at 6931 (E.D. Mo. 1974); Ostapowicz v. Johnson Bronze Co., supra, 369 F.Supp. at 531 (dictum); Reyes v. Missouri-Kansas-Texas Railroad Co., 53 F.R.D. 293, 297 (D.Kan. 1971); Torockio v. Chamberlain Manufacturing Co., 51 F.R.D. 517, 519 (W.D.Pa. 1970) (joinder pursuant to Rule 21 where insufficient facts for Rule 19 joinder);

Bremer v. Saint Louis Southwestern Railroad Co., supra, 310 F.Supp. at 1340. This line of authority disposes of defendant's claim that failure to name the employers in charges before the EEOC is fatal to joinder under the circumstances presented here.

The same policies dispose of defendant's second contention: that joinder is barred by plaintiffs' failure to add the employers and unions within 90 days of receipt of a right-to-sue letter. Defendant has cited no authority for the proposition that this statute of limitations will bar joinder of necessary parties pursuant to Rule 19. None of the decisions dealing with failure to name parties in EEOC charges, supra, addressed this issue, despite the fact that the statutory period will have run in most cases by the time a court has determined

that absent parties must be joined. The Court concludes that the policies underlying Rule 19, which have been held to override the conflicting Title VII policy of conciliation, must also override the policy of finality expressed in this short limitations period.

Of course, a plaintiff cannot amend his complaint to allege an entirely new cause of action and add the parties necessary thereto after the period of limitations has passed. See Marlowe v. Fisher Body, 489 F.2d 1057, 1064 (6 Cir. 1973). But Title VII permits a claimant to seek judicial relief for "any discrimination like or reasonably related to the allegations of the EEOC charge," without returning to the agency for administrative consideration of the new charges. Equal Employment Opportunity Commission v. Pacific Press Publishing Association, supra, 535 F.2d at 1186;

Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9 Cir. 1973). The present charge of maintaining a discriminatory referral system differs significantly from the original charge of discriminatory practices in placement of applicants on lists. But the new charge does not change the plaintiffs' basic contention: That discriminatory procedures in admission to defendant's apprenticeship program have drastically limited the ability of women to enter the carpentry trade. To anyone familiar with defendant's procedures, the shift in focus from the "list" to the "job" requirement for admission could reasonably have been expected to grow out of the original charge once information was made available as to the operation of the system. See Gamble v. Birmingham Southern Railroad Co., 514 F.2d 678, 688-689 (5 Cir. 1975); Ostapowicz v.

Johnson Bronze Co., 541 F.2d 394, 399 (3 Cir. 1976). Thus, the amendment was within the scope of the original charges, and any parties necessary to the adjudication thereof may be joined at this time.

Although there is no procedural bar to joinder of the absent parties, the affected employers number in excess of 4500, and more than 60 local unions appear to be involved. Plaintiffs have represented that joinder is feasible without explaining how they intend to proceed in light of these numbers. The only alternatives appear to be certification of defendant classes or joinder of contractor associations in lieu of individual employer members, and District Councils, the Carpenters 46 Northern Counties Conference Board, or the International itself in lieu of union locals. That either of these

alternatives can provide a feasible and adequate solution to the problems raised in Part II, supra, is open to serious question. The former would raise a host of questions under Rule 23, while the latter would raise further questions under Rule 19 as to whether individual employers and union locals remain indispensable parties despite the joinder of their representatives. Decision on these issues must, however, await plaintiffs' selection of a method of joinder and the submission of information not presently before the Court, including the precise number of employers affected, the number belonging to trade associations, the nature of those associations, their ability to represent and protect the interests of their members, and the relationships and respective roles of each of the various levels of union organization. Absent these facts,

it is impossible to determine whether joinder may be accomplished as required by Rule 19(a).

If joinder cannot be accomplished, the facts discussed in Part III, supra, will require that the action be dismissed pursuant to Rule 19(b). Any relief directed to the JATC alone would create a substantial possibility of prejudice to both employers and unions, as well as to the JATC itself. No form of decree or protective provision sufficient to avoid or reduce this prejudice has been subbested, and the Court is aware of none. Most significantly, there is no evidence that a judgment rendered in the absence of these parties would have any significant effect on the evil complained of in this action. Plaintiffs' alternative remedy is, unfortunately, burdensome and expensive: to pursue in individual lawsuits those employers

alleged to have discriminated. However, the Court cannot on this ground alone countenance any further expenditure of judicial resources in an action so unlikely to lead to effective relief.

Plaintiffs have strenuously urged that joinder be postponed until after determination on the issue of liability. Although the Court may have the power to join parties to participate in the formulation of relief, see United States v. Chesapeake & Ohio Railway Co., 471 F.2d 582, 592-593 (4 Cir. 1972), cert.denied, 411 U.S. 939 (1973); Pegues v. Mississippi State Employment Service, 57 F.R.D. 102, 105 (N.D.Miss. 1972), that procedure is appropriate only where, as in United States v. Chesapeake & Ohio Railway Co., supra, the presence of those parties cannot immediately be determined to be necessary for complete relief under Rule 19(a)(1). Where, as here, it

is clear from the outset that effective relief is impossible in the absence of the parties in question, it would be a monumental waste of resources to adjudicate the issue of liability before determining whether those parties can be joined. Moreover, where the absent parties claim interests that may be affected by a decree or that may generate relitigation, it is the exclusion of those parties from the liability phase of the litigation that may create the harms anticipated by Rule 19(a)(2). The proper course in such a case is plainly immediate joinder in order that all the issues may be litigated at one time. See Peques v. Mississippi State Employment Service, supra, 57 F.R.D. at 105.

Accordingly, IT IS HEREBY ORDERED that defendant's motion to dismiss for lack of jurisdiction over the subject matter by reason of failure to exhaust

state and administrative remedies is denied.

IT IS HEREBY FURTHER ORDERED that the employer contributors to the Carpenters Apprenticeship and Training Trust Fund for Northern California, and the local unions which refer apprentices registered with the defendant JATC to employment are indispensable parties in whose absence the action cannot in equity and good conscience proceed. If they are not joined within sixty (60) days of the date of this order, or such further time as the Court may, on good cause shown, allow, the action will be dismissed.

Dated: November 2, 1977.

/s/ Charles B. Renfrew
Charles B. Renfrew
United States District Judge